

NTSB Order No. EA-4296

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 18th day of November, 1994

Docket SE-13442

of a populated beach, in alleged violation of 14 C.F.R. 91.119(a) and (c)² and 91.13(a).³ For the reasons discussed below, respondent's appeal is denied and the initial decision is affirmed.

It is undisputed that on May 16, 1993, respondent piloted a Piper 28R aircraft alongside a beach known as Haulover Beach in the North Miami Beach area, a portion of which is designated as a nude beach. Further, there is unrebutted testimony in the record that, at the time of respondent's flight, there were hundreds of people on the beach and in the water. (Tr. 18, 22, Exhibit A-2.)

² Although the complaint cited section 91.119(b) rather than (c), it is clear from the context of that paragraph, which charges respondent with operating "closer than 500 feet to any person, vehicle, or structure," that the reference should have been to section 91.119(c). Respondent obviously understood the charge to be section 91.119(c), as he defended against that charge.

³ **§ 91.119 Minimum safe altitudes: General.**

Except when necessary for takeoff or landing, no person may operate an aircraft below the following altitudes:

(a) *Anywhere.* An altitude allowing, if a power unit fails, an emergency landing without undue hazard to persons or property on the surface.

* * *

(c) *Over other than congested areas.* An altitude of 500 feet above the surface, except over open water or sparsely populated areas. In those cases, the aircraft may not be operated closer than 500 feet to any person, vessel, vehicle, or structure.

§ 91.13 Careless or reckless operation.

(a) *Aircraft operations for the purpose of air navigation.* No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.

Respondent admitted that at the request of his two passengers -- who wished to see the beach "for sightseeing purposes" (Tr. 91) -- he flew along the beach at approximately 50 feet above the water. He maintained, however, that he remained at least 600 feet from the shoreline, and thus did not violate the 500-foot minimum distance from persons limitation in section 91.119(c). He also contended that he flew at an airspeed sufficient to allow him to gain altitude and safely "ditch" the plane further out at sea in the event of engine failure (Tr. 93), and that he thus did not violate section 91.119(a).

At the hearing, the Administrator presented eyewitness and expert testimony regarding respondent's flight. One of the eyewitnesses, a police officer, indicated that respondent flew 20-30 yards, laterally, from the shoreline, and only 12-18 feet directly above numerous bathers in the ocean. The officer also stated that many people in the area were alarmed by respondent's low flight and called it to his attention. The two other eyewitnesses called by the Administrator (Thomas Woodley and Cindy Thompson) testified that they were sitting with a group of people at the water's edge, and saw respondent's aircraft fly some 30 feet laterally from the shoreline, at approximately 30-40 feet above the water. According to Mr. Woodley, respondent flew so close to him that he "could have hit him with a stone" (Tr. 16), and the people in the water "just jumped and looked up when [the aircraft] went over." (Tr. 22.) This witness stated that in his eight years of living on this beach he had seen many

aircraft passing by, including low-flying banner-towing aircraft, but he had never seen a flight this low.⁴ Ms. Thompson confirmed Mr. Woodley's account, and indicated that she fully supported his suggestion that a complaint be made to the FAA.

FAA operations inspector Phillips Moore testified that, based on the witness statements he reviewed, and the testimony at the hearing, it appeared that respondent had clearly violated the 500-foot minimum permissible distance from persons restriction of section 91.119(c). He also opined that respondent had violated section 91.119(a) in that, if an aircraft engine had failed while respondent was flying at such a low altitude, he would not have been able to make a safe emergency landing.

In his initial decision, the law judge credited the testimony of the Administrator's eyewitnesses, thus implicitly rejecting respondent's contrary testimony as to his distance from persons on the surface. He noted that he had no reason to disbelieve the eyewitness testimony of Mr. and Mrs. Woodley and Ms. Thompson, but that even if there were some reason to suspect the accuracy of their testimony, Officer Graves -- who the law judge found to be a disinterested witness -- had corroborated their testimony. The law judge concluded that the Administrator's evidence was "overwhelming" (Tr. 117, 120) and, noting that the Administrator was seeking a minimal sanction for

⁴ The Administrator was also prepared to offer the testimony of Barbara Woodley, Mr. Woodley's wife, who also witnessed respondent's flight. However, the parties stipulated that she would have generally corroborated Mr. Woodley's testimony. (Tr. 41.)

the violation, he affirmed the complaint in its entirety.

On appeal, respondent challenges the law judge's credibility determination, arguing that the recollections of Mr. and Mrs. Woodley and Ms. Thompson were "tainted" because they admitted to having discussed the incident before the hearing, and because of the amount of time that had passed since the incident (ten months). He asserts that the law judge did not adequately consider the possibility of collusion among these three witnesses. As for Officer Graves, respondent suggests that he might not even have reported this incident but for the reaction of the "excited spectators" around him. Finally, respondent notes that the Administrator's eyewitness testimony was not entirely consistent⁵ and that, despite the alleged proximity of his aircraft, none of the witnesses could say how many people were on board the aircraft.

Respondent has failed to identify any valid reason to overturn the law judge's credibility finding. It is well-established that credibility determinations are within the exclusive province of the law judge, and we will not overturn a credibility finding unless the law judge acted arbitrarily, capriciously, or the result was inconsistent with the overwhelming weight of the evidence, factors not present here.

See Administrator v. Wilson, NTSB Order No. EA-4013 at 4-5 (1993). The law judge was aware of all of the factors raised by

⁵ We note that, while the eyewitness reports were not identical, they were not dramatically different and in every case indicated a violation of section 91.119(c).

respondent when he made his credibility judgment, and -- aside from the question of whether they are even relevant to the witnesses' credibility -- there is no indication that he failed to adequately consider them.

Respondent also challenges the Administrator's apparent introduction of an additional regulatory violation in the midst of the hearing in this case. The record confirms that counsel for the Administrator asserted during respondent's case -- apparently for the first time in this proceeding -- that the crowded beach constituted an "open air assembly of persons," and that respondent's low flight was thus in violation of section 91.119(b), which prohibits, among other things, operations over an open air assembly of persons within 1,000 feet above the highest obstacle within a horizontal radius of 2,000 feet of the aircraft. (Tr. 84, 96.) The law judge indicated agreement, in his initial decision, with the Administrator's position that the beach constituted an open air assembly of persons, but limited his official findings to affirming the allegations in the complaint. (Tr. 118, 120-1.)

Respondent denies the applicability of section 91.119(b), arguing that the beach should not be considered an open air assembly of persons. In the alternative, he asserts that if the beach is an open air assembly of persons within the meaning of that section, he is the victim of improper selective prosecution, since banner-towing aircraft frequently violate the restrictions of that section without apparent repercussions. However, we need

not resolve these issues because, notwithstanding the Administrator's and the law judge's comments on the matter, section 91.119(b) is not properly before us in this case. Although the complaint cited that section, the Administrator admits in his reply brief that this was a typographical error, and the language of the complaint makes clear that the intended reference was to section 91.119(c). (See footnote 2.)

In sum, respondent has identified no reversible error in the law judge's initial decision in this case. We uphold it to the extent that it affirms the 30-day suspension of respondent's pilot certificate based on his violation of 14 C.F.R. 91.119(a) and (c), and 91.13(a).

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied;
2. The initial decision is affirmed, as consistent with this opinion and order; and
3. The 30-day suspension of respondent's pilot certificate shall commence 30 days after the service of this opinion and order.⁶

HALL, Chairman, LAUBER and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.

⁶ For the purpose of this opinion and order, respondent must physically surrender his certificate to an appropriate representative of the FAA pursuant to FAR § 61.19(f).